No. 84-410

Office - Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER L. STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1984

O'CONNELL MACHINERY CO., PETITIONER

v.

M.V. "AMERICANA", ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bank of the United States v. *Planter's Bank*, 22 U.S. (9 Wheat) 904 4

Berizzi Bros. v. *Steamship Pesaro*, 271 U.S. 562 4

Detroit Trust Co. v. *The Thomas Barlum*, 293 U.S. 21 4

Gutierrez v. *Waterman S.S. Corp.*, 373 U.S. 206 5

Hurst v. *Triad Shipping Co.*, 554 F.2d 1237, cert. denied, 434 U.S. 861 5

Jet Line Services, Inc. v. *M/V Marsa El Hariga*, 462 F. Supp. 1165 2

Lucas v. *"Brinknes" Schiffahrts Ges.*, 387 F. Supp. 440 5

Mexico v. *Hoffman*, 324 U.S. 30 6

O'Donnell v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36 5

Panama R.R. v. *Johnson*, 264 U.S. 375 ..... 5, 6

Peru, Ex parte, 318 U.S. 578 6

Shaffer v. *Heitner*, 433 U.S. 186 6

Sheldon v. *Sill*, 49 U.S. (8 How.) 441 5

The Fidelity, 8 F. Cas. 1189 (No. 4758) 4

Page

Cases—Continued:

Verlinden, B.V. v. *Central Bank of Nigeria*, No. 81-920 (May 23, 1983) 2, 4, 6

United States v. *Wilder*, 28 F. Cas. 601 (No. 16,694) 4

Constitution, statutes and rule:

U.S. Const. Art. III, § 2, Cl. 1 ..... 2, 5

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* :

28 U.S.C. 1604 3

28 U.S.C. 1605(b) 1, 2, 3

28 U.S.C. 1605(b)(1) 1, 2, 3

28 U.S.C. 1610 ..... 3, 4

28 U.S.C. 1610(d) 3

Merchant Marine (Jones) Act, 46 U.S.C. 688 5

28 U.S.C. 2403(a) 2

Fed. R. App. P. 44 2

Miscellaneous:

H.R. Rep. 94-1487, 94th Cong., 2d Sess. (1976) 3

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-410

O'CONNELL MACHINERY CO., PETITIONER

v.

M.V. "AMERICANA", ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the court of appeals upholding the constitutionality, as applied to commercial vessels owned by foreign sovereigns, of 28 U.S.C. 1605(b), a provision of the Foreign Sovereign Immunities Act of 1976 (FSIA) that prohibits prejudgment attachment of the vessels or cargoes of foreign governments and substitutes an in personam action limited to the value of the vessel or cargo.

1. Petitioner brought this action in the United States District Court for the Southern District of New York against respondents Italian Line and the M.V. *Americana*, one of its vessels, for damages alleged to have been suffered by petitioner's cargo on that ship. Although aware of respondents' claim that the vessel was indirectly owned by the Italian Government, petitioner in effect arrested the *Americana* upon its arrival in New York. Pursuant to 28 U.S.C. 1605(b)(1), the district court dismissed the in rem

action against the vessel on the ground that the arrest was improper. Pet. App. 8a-19a.

On appeal, pursuant to Fed. R. App. P. 44, the court of appeals certified to the Attorney General the presence of a challenge to the constitutionality of a federal statute. The United States intervened pursuant to 28 U.S.C. 2403(a).

The court of appeals affirmed, rejecting petitioner's arguments that (1) the Italian Government's interest in the Italian Line was too remote to support immunity, (2) Italy by treaty had waived immunity from prejudgment attachment, and (3) 28 U.S.C. 1605(b) is unconstitutional insofar as it precludes prejudgment attachment of commercial vessels owned by foreign sovereigns. Pet. App. 2a-7a.

2. In admiralty cases brought to enforce maritime liens against vessels of foreign states, Section 1605(b)(1) provides that the lien shall be deemed an in personam claim limited to the value of the vessel, and that arrest of the vessel "pursuant to process obtained on behalf of the party bringing the suit" will result in immunity from any claim. See *Jet Line Services, Inc.* v. *M/V Marsa El Hariga*, 462 F. Supp. 1165, 1174-1178 (D. Md. 1978). Petitioner argues (Pet. 7-12) that this provision of the FSIA violates Article III, Section 2, Clause 1 of the Constitution, which provides that "[t]he Judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction." This argument is supported by no court decision and is entirely without merit.

a. In 1976, Congress passed the FSIA in order to free the federal government from case-by-case diplomatic pressures in the determination of foreign sovereign immunity, to clarify the governing standards, and to assure litigants that immunity decisions are made on purely legal grounds and under procedures that ensure due process. *Verlinden, B.V.* v. *Central Bank of Nigeria*, No. 81-920 (May 23, 1983), slip op. 7. In addition, by providing "for the first time in U.S.

law, * * * a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state," the FSIA "render[ed] unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction." H.R. Rep. 94-1487, 94th Cong., 2d Sess. 8 (1976). The FSIA accordingly precluded prejudgment attachment of the property of foreign sovereigns, except in limited circumstances.[1]

This policy is codified in 28 U.S.C. 1605(b), which denies immunity to a foreign state in cases where a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state engaged in commercial activity. The maritime lien "shall * * * be deemed to be an in personam claim against the foreign state," but judgment is limited to the value of the vessel or cargo upon which the lien arose. However, Section 1605(b)(1) preserves the foreign government's immunity from in personam liability in the event that a party attaches its vessel or cargo in violation of the section (unless the party was unaware that the vessel or cargo was owned by a foreign state). Total immunity remains as to any in rem proceeding (28 U.S.C. 1604).

In sum, the FSIA merely substitutes a long-arm provision and a right of personal service for the prior procedure of in rem attachment, in cases involving commercial vessels owned by foreign sovereigns. In addition, in Section 1610 the FSIA for the first time makes some property of foreign states subject to execution. Any "loss" of prejudgment and

---

[1]Prejudgment attachment of property owned by foreign sovereigns is permitted only if "the foreign state has explicitly waived its immunity from attachment prior to judgment" and "the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction." 28 U.S.C. 1610(d).

attachment remedies thus was compensated for not only by the long-arm and service provisions of the FSIA, but also by Section 1610. See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 91 (1976) (testimony of Michael M. Cohen). There has, therefore, been no substantial diminution of a plaintiff's or libellant's substantive rights in admiralty, as petitioner suggests (Pet. 9).[2] There has merely been a readjustment of available remedies.

b. The decision below is consistent with numerous decisions by this Court holding that Congress has the constitutional authority to modify the law of admiralty. For instance, in *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21 (1934), relied upon by petitioner (Pet. 7), the Court

---

[2]As the court of appeals explained (Pet. App. 6a), unconsented suits against foreign sovereigns were not permitted in admiralty at the time of the adoption of the Constitution. Petitioner's argument to the contrary (Pet. 10-12) with regard to government-owned commercial ships is without merit. *Bank of the United States* v. *Planter's Bank*, 22 U.S. (9 Wheat.) 904 (1824), did not involve the immunity of vessels at all. *United States* v. *Wilder*, 28 F. Cas. 601 (C.C.D. Ma. 1838) (No. 16, 694), merely held that government-owned cargo was subject to the general average. *The Fidelity*, 8 F. Cas. 1189 (C.C.S.D.N.Y. 1879) (No. 4758), upheld the immunity of a tug owned by a municipal corporation; dictum apparently referred to by petitioner involved private ships captured as prize. 8 F. Cas. at 1191. The fact that *Berizzi Bros.* v. *Steamship Pesaro*, 271 U.S. 562 (1926), relied upon English cases that very recently have been overruled (Pet. 12) in no way undercuts the court of appeals' reliance on *The Pesaro* for the proposition that government-owned commercial vessels would have been immune in 1789. Indeed, this Court recently relied on *The Pesaro* for precisely the proposition at issue here: that early decisions of this Court "extend[ed] virtually absolute immunity to foreign sovereigns." *Verlinden, B.V.*, slip op. 5. In any event, as the court of appeals held in the alternative (Pet. App. 6a-7a), Congress has the power to modify maritime law regardless of the status of maritime law in 1789.

upheld a provision in the Ship Mortgage Act of 1920 permitting the foreclosure of a ship mortgage by an in rem suit in admiralty. 293 U.S. at 42-52. Prior to the Ship Mortgage Act there was no such jurisdiction in admiralty. *Id.* at 32. This Court has subsequently upheld the statutory extension of maritime law protection to seamen injured while ashore in the service of their vessels, *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943), and the statutory extension of admiralty jurisdiction to torts committed by a shipowner while the ship is being unloaded, even though the impact of the tort is felt ashore. *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963).

Just as Congress may provide remedies previously unavailable in admiralty, it also may limit or abolish remedies previously available in admiralty. See *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1244-1246 (3d Cir.), cert. denied, 434 U.S. 861 (1977), following *Lucas* v. *"Brinknes" Schiffahrts Ges.*, 387 F. Supp. 440 (E.D. Pa. 1974). Merely because federal judicial power may extend to categories of cases under Article III, Section 2, Clause 1, does not mean that Congress must extend federal jurisdiction to all cases within such categories (*e.g.*, *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850)), or that Congress is bound by past forms of remedies available.

Plaintiff relies (Pet. 8) upon a statement in *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386 (1924), to the effect that there are "boundaries" to admiralty jurisdiction, which cannot be altered by legislation. Where those boundaries lie, however, is very much in doubt, since neither that decision nor any other decision of this Court has relied upon the theoretical existence of such boundaries to invalidate a statutory modification of remedies in admiralty. Indeed, in *Panama R.R.* this Court *upheld* the federal legislation under attack (Merchant Marine (Jones) Act, 46 U.S.C. 688) despite its

thoroughgoing rearrangement of substantive maritime 264 U.S. at 388.

Wherever those boundaries may be, the elimination of an in rem remedy against foreign sovereigns would clearly be constitutional, in view of the in personam remedy granted to plaintiffs suing sovereigns engaged in commercial activity. The distinctions between an in rem proceeding and the in personam remedy provided by the FSIA are distinctions about the form in which jurisdiction is asserted, not the nature of the underlying cause of action. Cf. *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977).

Petitioner asks this Court, in effect, to draw rigid constitutional lines in this area, where heretofore the Court "consistently has deferred to the decisions of the political branches — in particular, those of the Executive Branch — on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden, B.V.*, slip op. 5-6 (citing *Ex parte Peru*, 318 U.S. 578, 586-590 (1943); *Mexico* v. *Hoffman*, 324 U.S. 30, 33-36 (1945)). Neither the text of the Constitution nor any precedent of this Court supports petitioner's argument that Congress is without power to determine that maritime liens against commercial vessels owned by foreign sovereigns must be enforced on an in personam rather than an in rem basis.[3]

---

[3]We have limited this memorandum to the issue that forms the basis for the government's right to intervene, the constitutionality of the FSIA. We also agree, however, with the court of appeals' resolution of the waiver issue under the Treaty of Friendship, Commerce, and Navigation with Italy. See Pet. App. 5a.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

DOJ-1984-11